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Supreme Court of the United States

OCTOBER TERM, 1982

JOHN J. HARRIS and RUTHETTA HARRIS,
Petitioners and Plaintiffs-Appellants,

v.

RESEARCH FEDERAL CREDIT UNION,
Respondent and Defendant-Appellee.

and

EUGENE OSTROWE and KAREN OSTROWE,
Petitioners and Plaintiffs-Appellants,

v.

DEARBORN FEDERAL CREDIT UNION
Respondent and Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is there a conflict in the decisions of the United States Circuit Courts of Appeals as to whether in making the disclosure of a security interest in after-acquired property required by Regulation Z to the Truth In Lending Act, the creditor should specify the Uniform Commercial Code's limitation of the interest to property acquired within 10-days of the consumer credit transaction?

II. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision by reversing the District Court on the basis of a misrepresentation as to the state of the record before the District Court regarding the relevant Federal Reserve Board staff interpretations of the issue posed in Question I?

III. Did the Court of Appeals decide a federal question in a way in conflict with the applicable decision of this Court by failing to follow this Court's instruction in *Ford Motor Credit Co. v. Milhollin* as to the collateral issue of whether the creditors' respective acceleration clauses are confusing and misleading in violation of Regulation Z to the Truth In Lending Act, 12 CFR § 226.6 (c)?

IV. Is there a conflict in the decisions of the United States Circuit Courts of Appeals as to whether the Truth In Lending Act's civil enforcement provision prior to its amendment, effective October 1, 1982, allowed each obligor on a consumer credit transaction to recover individually the full civil penalty for a violation?

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GROUNDS ON WHICH JURISDICTION IS INVOKED

1. Federal jurisdiction is vested pursuant to 15 USC § 1640(e).

2. The United States Court of Appeals for the Sixth Circuit, Hon. Albert Engel, Cornelia Kennedy and Anthony Celebrezze reversed the judgment of the United States District Court for the Eastern District of Michigan, Hon. John Feikens, by Order entered Jan. 5, 1982.

3. The Court of Appeals by Order entered April 22, 1982, denied petitioner's petition for rehearing.

4. This is a civil case and this Court's jurisdiction is evoked pursuant to 28 USC § 1254(1).

STATUTES AND REGULATIONS

Truth in Lending Act

Any creditor making a consumer loan or otherwise extending consumer credit in a transaction which is neither a consumer credit sale nor under an open end consumer credit plan shall disclose each of the following items, to the extent applicable:

(8) A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates. 15 USC § 1639(a)(8) eff. July 1, 1969, until October 1, 1982.

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

(9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type. 15 USC § 1638(a)(9) eff. Oct. 1, 1982.

Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100.00 nor greater than $1,000.00; and 15 USC § 1640(a)(l), eff. July 1, 1969 until

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

1976 Amendments. Subsec. (a). Pub.L. 94-240, § 4(1), added "or E" following "part D" in opening provisions.

Subsec. (a)(2)(A). Pub.L. 94-240 § 4(2), designated existing provision as cl. (i) and added cl. (ii).

(d) When there are mutiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

15 USC § 1640(d) Effective October 1, 1982.

Uniform Commercial Code

No security interest attaches under an after-acquired property clause to consumer goods other than accessions when given as additional security unless the debtor acquires rights in them within ten days after the secured party gives value. MCLA § 440.9204(4)(b); MSA 19.9204(4)(b).

Regulation Z

At the creditor's option, additional information or explanations may be supplied with any disclosure required by this Part, but none shall be stated, utilized, or placed so as to *mislead* or *confuse the customer or contradict, obscure, or detract attention* from the information required by this Part to be disclosed. (emphasis added) 12 CFR §226.6(c) Effective July 1, 1969 to April 1, 1981, although at creditors' option, until October 1, 1982.

(b) Disclosures in sale and nonsale credit. In any transaction subject to this section, the following items, as applicable, shall be disclosed:

(5) A description or identification of the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after-acquired property will be

subject to the security interest, or if other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired.

12 CFR §226.8(b)(5) Effective July 1, 1969 to April 1, 1981, although at creditor's option, until October 1, 1982.

For each transaction, the creditor shall disclose the following information as applicable:

(m) **Security interest.** The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction or in other property identified by item or type.

12 CFR § 226.18(m) effective April 1, 1981, but compliance optional until October 1, 1982.

(25) "Security interest" means an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law. It does not include incidental interests such as interests in proceeds, accessions, additions, fixtures, insurance proceeds (whether or not the creditor is a loss payee or beneficiary), premium rebates, or interests in after-acquired property. For purposes of disclosure under §§ 226.6 and 226.18, the term does not include an interest that arises solely by operation of law. However, for purposes of the right of recission under §§ 226.15 and 226.23, the term does include interests that arise solely by operation of law.

12 CFR § 226.2(a)(25) eff. April 1, 1981, but compliance optional until October 1, 1982.

CONCISE STATEMENT OF THE CASE

Since the Truth in Lending Act first became effective July 1, 1969, it has generated a high volume of litigation. At the same time, the number of substantive disclosure issues over which the United States Circuit Courts of Appeals have split has been relatively few. Indeed, this Court has recently resolved all but one remaining issue. *Ford Motor Credit Co.* v *Milhollin*, 444 U.S. 555; 63 L.Ed2d 22; 100 S.Ct. 790 (1980); *Ford Motor Credit Co.* v *Cenance*, 452 U.S. 155, 68 L.Ed2d 744, 101 S.Ct. 2239 (1981); *Anderson Bros. Ford* v *Valencia*, 452 U.S. 205; 68 L.Ed2d 783; 101 S.Ct. 2266 (1981).

Not surprisingly, this one remaining issue has already been posed to this Court. In *Pollack* v *General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976) *aff'd on rehearing*, 552 F.2d 1142 (5th Cir. 1977) *cert. den.*, 434 U.S. 891; 98 S.Ct. 265, 54 L.Ed2d 176 (1977), and *Basham* v *Finance America Corp*, 583 F.2d 918 (7th Cir. 1978) *cert. den.* 439 U.S. 1128; 99 S.Ct. 1046; 59 L.Ed2d 189 (1979), the Court denied certiorari from decisions on this issue by the Fifth and Seventh Circuits in favor of the credit consumer.

The majority of reported decisions have taken the pro-consumer position on this issue. *Aronson Furniture Co* v *Johnson*, 365 N.E.2d 61, 64; 47 Ill. App 3d 648 (1977); *Bartlett* v *Com's Federal S. & L. Ass'n of Omaha*, 433 F.Supp. 284, 286 (N.Neb. 1977); *Bell* v *Loosier of Albany, Inc.*, 222 S.Ed.2d 839, (Ga. Ct. App. 1975) *vac and remanded on other grds*, 229 S.E.2d 374 (Ga. Sup. Ct. 1976), *implemented* 231 S.E.2d 142 (Ga. Ct.App. 1976); *Bizier* v *Globe Financial Services*, 654 F.2d 1 (1st Cir. 1981); *Brooks* v *AVCO Financial Services of Barre, Inc*, CCH Consumer Credit Guide, ¶ 97,733 (D.Vt. 1979); *Brown* v *OSLIFE Credit Corp*, 602 S.W.2d 94 (Tex. Civ. Ct. App. 1980); *Cadmus* v *Commercial Credit Plan, Inc.*, 437 F.Supp. 1018, 1029 (D. Del. 1977); *Conrad* v *Beneficial Finance Co of New York, Inc.*, 398 NYS 2d 499 (1977); *In re Dunne*, 407 F.Supp. 308, 311 (D.R.I. 1976); *Ecenrode* v

Household Finance Corp. of South Dover, 422 F.Supp. 1327 (D.Del. 1976); *Ellis* v *Hensley,* (Ohio Ct. App. 1979), CCH Consumer Credit Guide ¶ 97,906; *Empire Finance Co of Louisville, Inc.* v *Ewing,* 558 SW2d 619 (C. App. Ky 1977); *Evans* v *Household Finance Corp,* (D.Iowa 1973) CCH Consumer Credit Guide ¶ 99,007; *First National Bank of Cincinnati* v *Williams,* (Ohio Ct. App. 1980), CCH Consumer Credit Guide ¶ 97,393; *Franklin* v *Community Federal Saving & Loan Ass'n,* 629 F.2d 514 (8th Cir 1980); *Irvin* v *Public Finance Co.,* 340 So.2d 811 (Ala. Ct. Civ. App. 1976); *Jacklitch* v *Redstone Federal Credit Union,* 463 F.Supp 1134 (N.D. Ala. 1979) aff'd 615 F.2d 679 (5th Cir. 1980); *Jones* v *Allied Loans, Inc.,* 447 F.Supp 1121 (D.S. Carolina 1977); *Johnson* v *Associates Finance, Inc.,* 369 F.Supp. 1121 (S.D. Ill. 1974); *Johnson* v *Johnson* (M.D. Ga. 1975) CCH Consumer Credit Guide ¶ 98,566; *Lee* v *Redstone Federal Credit Union,* 615 F.2d 682 (5th Cir. 1980); *Liberty Loan Corp* v *Boyajian,* 407 F.Supp 308 (D.I. 1976); *Lowery* v *Finance America Corp.,* 231 SE2d 904, 32 NC App 174 (1977); *Murphy* v *Beneficial Finance Co of Central Ohio,* 443 F. Supp. 463, 466-8 (S.D. Ohio 1976); *Noel* v *General Finance Corp,* 421 NE 2d 25 (Ind. Ct. App. 1981); *Sneed* v *Beneficial Fin. Co. of Hawaii,* 410 F.Supp. 1135, 1138-45 (D. Ha. 1976); *State Employees Credit Union* v *Curry,* CCH Consumer Credit Guide ¶ 98,658 (Lansing District Court 54-A) (1974); *Stone* v *Modern Loan Co., Inc.,* (W.D. Ky 1976) CCH Consumer Credit Guide ¶ 98,356; *Tinsman* v *Moline Beneficial Finance Co.,* 531 F.2d 815, 819 (7th Cir. 1976); *Union Trust Co of Ellsworth* v *Hardy,* 400 A.2d 384 (Me Sp. Jud. Ct. 1979); *Willis* v *Town Fin. Corp. of Atlanta,* 416 F.Supp. 10, 11-13 (N.D. Ga. 1976); *Woods* v *Beneficial Finance Co. of Eugene,* 391 F Supp 9, 11-12 (D. Ore. 1975);

Notwithstanding this weight of authority in favor of the consumer, a panel of the Sixth Circuit in this case, and the 10th Circuit in *Montoya* v *Postal Credit Union,* 630 F.2d 745 (10th Cir. 1980) have taken the pro-creditor position, based on

purported reliance on *Ford Motor Credit Co* v *Milhollin, supra.* These two decisions, notably, do not acknowledge the above pro-consumer authority. The First Circuit, on the other hand, in *Bizier* v *Globle Financial Services, supra,* in acknowledging *Ford Motor Credit Co* v *Milhollin, supra,* has held with the pro-consumer position.

There are also collateral issues discussed in sections II, III, and IV below under **Reasons Why Certiorari Should be Granted.**

It should be noted that the case involves two consolidated actions. *Harris* v. *Research Federal Credit Union, Ostrowe* v. *Dearborn Federal Credit Union.* The cases were consolidated because the parties, respectively, are represented by the same counsel, and the credit documents involved are virtually identical, being forms issued by the Michigan Credit Union League.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THERE IS A CONFLICT IN THE DECISIONS OF THE UNITED STATES CIRCUIT COURTS OF APPEALS AS TO WHETHER IN MAKING THE DISCLOSURE OF A SECURITY INTEREST IN AFTER ACQUIRED PROPERTY REQUIRED BY REGULATION Z TO THE TRUTH IN LENDING ACT THE CREDITOR SHOULD SPECIFY THE UNIFORM COMMERCIAL CODE'S LIMITATION OF THE INTEREST TO PROPERTY ACQUIRED WITHIN 10-DAYS OF THE CREDIT TRANSACTION.

The Act requires disclosure of the security interest held by the creditor. 15 USC § 1639(8), 15 USC § 1638(9)

Regulation Z required a description of identification of the security interest claimed in all property including after-acquired property until April 1, 1981. 12 CFR § 226.8(b)(5).

§9-204 of the Uniform Commercial Code [in effect in Michigan, with respect to the individual transactions in this case, MCLA 440.9204(4)(b); MSA 19.9204(4)(b)] limits the security interest in after acquired property to property acquired within 10 days of the transaction.

This 10-day limitation is important in the average consumer credit transaction which typically provides for a term of from six months to four years. The creditor's interest may only attach to property acquired within 10 days of the transaction, not to property acquired within the full six month to four year term of the obligation between the consumer and the creditor.

A statement in the disclosure that there is a security interest in after-acquired property without specifying the UCC limitation does not adequately describe or identify the actual interest to which the creditor is entitled. Without specification of the limitation, the average consumer is left with the impression that the security interest attaches to any property acquired during the term of the loan, an impression inconsistent with the basic purposes of the Act.

The Truth in Lending Act reflects a transition in Congressional policy from a philosophy of let the buyer beware to let the seller disclose. *Mourning* v. *Family Publication Service,* 411 US 356, 36 L. Ed2d 318, 93 S. Ct. 1652 (1973).

Meaningful disclosure does not mean more disclosure. Rather, it describes a balance between competing considerations of complete disclosure and the need to avoid informational overload. *Ford Motor Credit Co.* v. *Milhollin, supra.*

A meaningful description or identification of the security interest in after-acquired property includes specification of the UCC limitation. It is evident that this limitation may be specified simply and succinctly without creating informational overload.

It is not surprising that the overwhelming majority of the courts that have addressed this issue have taken the pro-consumer position, nor is it surprising that twice this Court has declined to review decisions in favor of the consumer on this issue.

Nonetheless, in the light of *Ford Motor Credit Co.* v. *Milhollin, supra,* the question must be posed: What is the position of the Federal Reserve Board staff on the issue?

Therein lies the problem, for unlike the specific disclosure issues before this Court in *Ford Motor Credit Co.* v. *Milhollin, supra,* and *Anderson Bros. Ford* v. *Valencia, supra,* the FRB staff's published letters on this issue have not been clear and consistent.

The first published letter, FRB Staff Letter No. 829, August 22, 1974, CCH Consumer Credit Guide ¶31,151, clearly took the pro-consumer position. App 17

This was the published staff letter in effect at the time of the individual transactions at issue in this case. If the FRB staff had let the matter rest with this letter, there would not be the present split among the U. S. Circuit Courts of Appeals. The problem is that notwithstanding reported decisions consistent with this first letter, *Bell* v. *Loosier of Albany, Inc., supra, Evans* v. *Household Finance Corp., supra, Johnson* v. *Associates Finance, Inc., supra, Johnson* v. *Johnson, supra, State Employees Credit Union* v. *Curry, supra, Woods* v. *Beneficial Finance Co. of Eugene, supra,* the FRB staff did a dramatic turnabout and attempted to repudiate this letter.

This attempt first appears in an unpublished Opinion and Clarification Letter brought to the Court's attention in *Willis* v. *Town Finance Co., supra.* The *Willis* Court, in examining the circumstances surrounding this letter's issuance, was prompted to comment:

> *It appears to the Court that these Opinion and Clarification Letters are instigated by credit industry*

> *inquiries and the interpretations emanating therefrom appear to be generally favorable to the industry.* There presently appears to exist the opportunity for credit industry sources dissatisfied with a particular court-made truth-in-lending interpretation to overturn that interpretation by appealing to an individual Federal Reserve Board employee to issue an Opinion Letter changing that prevailing judicial interpretation of the Act. *This type of lobbying process is quite feasible for credit industry representatives but is largely unfeasible for the individual consumers which this Court sees in the vast majority of truth-in-lending matters.*
>
> Rather than affording great weight to an *ex post facto* interpretation in a Staff Opinion Letter by a single Federal Reserve Board employee, the Court suggests that it might be appropriate for the Court of Appeals to consider whether such a result might have been the result of one-sided extra-judicial lobbying by credit industry representatives to overturn established court precedent. at F. Supp 12

In the next published letter, FRB Letter No. 983, Dec. 30, 1975, CCH Consumer Credit Guide ¶31,323, on the issue, the FRB staff pulled the rug out from under its first letter and the emerging pro-consumer court decisions. App 18

It is this letter that the Sixth Circuit panel in this case and the 10th Circuit panel in *Montoya* v. *Postal Credit Union, supra,* invoked to create the split. *Murphy* v. *Beneficial Finance Co. of Central Ohio, supra,* cogently critiques these two conflicting letters.

The FRB staff then had yet another change of heart in FRB Staff Letter No. 1053, May 28, 1976, CCH Consumer Credit Guide ¶31,393. In this letter, to use the words of the Sixth Circuit panel, "the Federal Reserve Board changed the disclosure requirements relating to after-acquired property clauses." App 20

The 10th Circuit, on the other hand, acknowledged this letter but seized on the use of the word "all" in an attempt to reconcile the two letters. The problem, of course, is that any reference to after-acquired property regardless of whether the particular prefix word "all" is included must necessarily leave the impression that any after-acquired property is subject to the creditor's security interest unless the UCC limitation is specified. In any event, respondents' clause does not merely state that there "may" be a security interest in after-acquired property, but affirmatively states that it "will . . . cover" after-acquired property. (District Court Opinion App 5)

The disclosure statements provide (District Court Opinion App 5):

> *Security Agreement will* secure future or other indebtedness, and cover after-acquired property. (Emphasis added)

The respective Security Agreements (A5)[1] and (A41) refer to "*All* Household Goods, Furniture and Appliances . . ." (Emphasis added)[2]

Subsequently, FRB Official Staff Interpretation No. FC-0023, 41 F.R. 52980, November 22, 1976, CCH Consumer Credit Guide ¶31,491 has stated that reference to after-acquired property being subject to the Uniform Commercial Code is sufficient. App. 20

From the consumer's standpoint mere reference to the Uniform Commercial Code is inadequate. Unless the consumer knows the Code's 10-day limitation, something which the average American consumer would not actually know, the reference is not "meaningful." In any event, in the transactions at hand there was no alerting reference to the UCC.

On other similar issues, the FRB staff has taken the position that both disclosure statements and terms in the underlying agreements must not be phrased so as to mislead or confuse the

consumer as to the applicable state law restriction on the creditor's rights. FRB Staff Letter No. 1084, July 15, 1976, CCH Consumer Credit Guide ¶ 31,424; FRB Staff Letter No. 1151, January 31, 1977, CCH Consumer Credit Guide ¶ 31,531; FRB Official Staff Interpretation No. FC-0071, 42 F.R. 25491, April 28, 1977, CCH Consumer Credit Guide ¶ 31,581; FRB Staff Letter No. 1324, November 11, 1978, CCH Consumer Credit Guide ¶ 31,827.[3]

II. THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION BY REVERSING THE DISTRICT COURT ON THE BASIS OF A MISREPRESENTATION AS TO THE STATE OF THE RECORD BEFORE THE DISTRICT COURT REGARDING THE RELEVANT STAFF INTERPRETATIONS OF THE ISSUE POSED IN SECTION I.

Quoting from FRB Staff Letter No. 983, the Sixth Circuit's Order states:

> Neither the Regulation nor the Act clearly state whether the ten-day limit must or must not be disclosed. *The staff opinion here was in effect at the time of trial and is clearly not irrational. After the trial in this case the Federal Reserve Board changed the disclosure requirements relating to after-acquired property clauses,* but this change alone does not render the otherwise rational staff opinion irrational. Accordingly, it was error for the District Court to rule contrary to the staff opinion. (Emphasis added) App

Plaintiffs' Trial Brief (A303) cited the District Court to the later FRB Staff Letters, also cited in Appellants' Reply and Cross-Appellees' Brief, p.2. Respondents did not challenge these citations, and the District Court naturally followed the

revised position, as would be required by *Ford Motor Credit Co.* v. *Milhollin,* 444 U.S. 555; 63 L.Ed 2d; 100 S.Ct. 790 (1980).

In the Petition for Rehearing to the Court of Appeals, p.1, plaintiffs brought the true state of the record before the District Court to the panel's attention, but the panel was not persuaded to modify its decision. App 4

III. THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISION OF THIS COURT BY FAILING TO FOLLOW THIS COURT'S INSTRUCTION IN *FORD MOTOR CREDIT CO.* V. *MILHOLLIN* AS TO THE COLLATERAL ISSUE OF WHETHER THE CREDITORS' ACCELERATION CLAUSES ARE CONFUSING AND MISLEADING IN VIOLATION OF REGULATION Z TO THE TRUTH IN LENDING ACT, 12 CFR § 226.6(c).

The District Court held that the right of acceleration in the event of default must be disclosed on the disclosure statement. App As a consequence of *Ford Motor Credit Co.* v. *Milhollin, supra,* the District Court's specific holding had to be set aside, as Appellant's Brief to the Sixth Circuit acknowledged, p. 61. Appellant's Brief went on to discuss the collateral holding of *Ford Motor Credit Co.* v. *Milhollin* with regard to the actual wording of the acceleration clause.

The respondents' acceleration clause states:

> Upon such defaults and at any time thereafter, secured party shall declare all obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Uniform Commercial Code. App 8

The respondents' respective disclosure statements disclose the amount financed, total payments, and the original computed finance charge. The wording of the acceleration clause is confusing and misleading because it conveys the impression that on default, the full amount, without reduction of the finance charge, will become due. The District Court correctly concluded that under respondents' application of the United States Rule in computing interest, acceleration will effectively reduce the finance charge from the amount disclosed on the disclosure statement. App 16

It is precisely because acceleration will change the finance charge from the amount disclosed on the disclosure statement, but the literal language of the clause leaves the contrary impression, and that there is a separate violation of 12 CFR § 226.6(c).

Contrary to *Ford Motor Credit Co.* v. *Milhollin's* clear directive, n. 14, at US 570; L.Ed 2nd 34; S. Ct. 799, the Sixth Circuit panel did not even acknowledge this collateral issue. In the Petition for Rehearing, p. 10, plaintiffs brought this apparent oversight to the panel's attention, but the panel was not persuaded to modify its decision. App 4

IV. THERE IS A CONFLICT IN THE DECISIONS OF THE UNITED STATES COURT OF APPEALS AS TO WHETHER THE TRUTH IN LENDING ACT'S CIVIL ENFORCEMENT PROVISION PRIOR TO ITS AMENDMENT, EFFECTIVE OCTOBER 1, 1982, ALLOWED EACH OBLIGOR ON A CONSUMER CREDIT TRANSACTION TO RECOVER INDIVIDUALLY THE FULL CIVIL PENALTY FOR VIOLATION.

This case represents the typical example of a husband and wife co-signing as joint obligors on a consumer loan. The civil enforcement provision as it has been worded clearly allows each spouse to recover the full individual civil penalty of double the finance charge between a maximum of $1,000.00

and a minimum of $100.00. 15 USC § 1640(a)(1), as amended 15 USC § 1640(a)(2)(A)(i). Effective October 1, 1982, an additional section has been added, 15 USC § 1640(d) that explicitly limits recovery to one civil penalty per transaction where multiple obligors are involved. In the more analytical and thorough of the U. S. Circuit Court of Appeals decisions, the Fifth, Seventh, and Eighth Circuits, *Davis* v. *United Companies Mortg. & Inv. of Greta* 551 F2d 971, 972-973 (5th Cir. 1977); *Mirabel* v. *General Motors Acceptance Corp.* 537 F2d 871, 881-883 (7th Cir. 1976); *Andersen* v. *Farmers Bank of Clatonia,* 640 F2d 1347 (8th Cir. 1981), have held effectively that the language of 15 USC § 1640(a), absent the express terms of 15 USC § 1640(d) effective October 1, 1982, clearly provide for an individual recovery for each obligor. See also *Clausen* v. *Beneficial Finance of Berkeley* 423 F Supp 985 (N.D. 1976); *Tarplain* v. *Baker Ford, Inc.* 466 F Supp 1340, 1348-1350 (1D, R.I. 1979); *Kelly* v. *Beneficial Finance Co. of Alabama* 374 So.2d 338, 339-340 (1979); *Griggs* v. *Provident Consumer Discount Co.,* 503 F.Supp 246 (E.D. Penn. 1980).

On the other hand, the Fourth, Ninth and Tenth Circuits in less analytical decisions have held that notwithstanding the wording of these provisions, only one recovery to multiple obligors would be allowed. *Powers* v. *Sims and Levin,* 542 F2d 1216 (4th Cir. 1976); *Hinkle* v. *Rock Springs National Bank,* 538 F.2d 295 (10th Cir. 1976); *Milhollin* v. *Ford Motor Credit Co.,* 588 F.2d 753 (9th Cir. 1978) *rev'd on other grds.* 444 U.S. 555; 63 L.Ed.2d 22; 100 S.Ct. 790 (1980).

There is some ambiguous language in an excerpt from the Congressional history suggesting that only one recovery for multiple obligors, but as discussed in *Mirabel* v. *General Motors Acceptance Corp., supra,* and *Davis* v. *United Companies Mortg. & Inv. of Greta, supra,* this excerpt is not dispositive in view of the provision's wording.

The District Court construed the pre-amended provision to allow for only one recovery. The Sixth Circuit panel did not reach the issue on petitioners' appeal because of its disposition in favor of respondents on their cross-appeal.

This petition provides this Court the opportunity to resolve this conflict.

Footnotes

1. Arabic numeral page references to Appendix filed with the United States Court of Appeals.

2. On the Ostrowe Security Agreement, the box next to "*All* Household Goods, etc" is not marked, but if this were construed to mean that the Disclosure Statement claims a security interest which the creditor does not have, this too would be a violation of the Act. *Ives* v. *W. T. Grant Co.*, 522 F.2d 749, 761 (2d Cir. 1975).

3. In the revised Regulation Z, eff. April 1, 1981, but compliance not required until October 1, 1982, itemization of a security interest in after-acquired property is no longer required on the Disclosure Statement. 12 CFR § 226.2(n)(25), 226.18(m).